UNITED STATES OF AMERICA
DISTRICT OF MAINE

FRANK CUNNINGHAM,	)	
	)	
Petitioner	)	
v.	)	Civil No. 02-158-B-S
	)	
JEFFREY MERRILL, WARDEN,	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2254 MOTION

Frank Cunningham has filed a motion pursuant to 28 U.S.C. § 2254 seeking relief from his conviction in the State of Maine for aggravated assault. In this federal habeas petition he argues that his trial attorney rendered unconstitutionally ineffective assistance. (Docket No. 1.) The State has responded (Docket No. 8) and Cunningham has replied. (Docket No. 11). I now recommend that the Court **DENY** Cunningham the relief he seeks for the reasons that follow.

Discussion

A. Brief Background

A Maine jury found Cunningham guilty of aggravated assault and not guilty of two additional counts: attempted murder and gross sexual assault. The criminal statute defining Cunningham's crime of conviction reads:

> **1.** A person is guilty of aggravated assault if he intentionally, knowingly, or recklessly causes:
>
> **A.** Serious bodily injury to another; or
>
> **B.** Bodily injury to another with use of a dangerous weapon; or
>
> **C.** Bodily injury to another under circumstances manifesting extreme indifference to the value of human life. Such circumstances include, but are not limited to, the number, location

or nature of the injuries, the manner or method inflicted, or the observable physical condition of the victim.

2. Aggravated assault is a Class B crime.

17-A M.R.S.A.§ 208. Cunningham was sentenced to ten years, with all but eight years suspended and three years probation.[1]

The Maine Supreme Court, sitting as the Law Court on Cunningham's direct appeal, summarized what facts the jury could have found in reaching its verdict:

> After an evening of drinking, defendant and a young female acquaintance began to fight while riding in a vehicle. The driver, a friend of defendant, pulled the vehicle to the side of the road and defendant threw the woman into the roadway. She attempted to run but defendant caught her and swung her in the air like a "rag doll." He threw her down, slammed his knee into her chest, and placed his other knee across her throat. She could not breathe and she thought she was going to die. A car stopped to investigate, shining its headlights on defendant. He then stood up and let the woman go.
>
> The two passengers in the car that stopped to investigate testified that they witnessed defendant jumping on, kicking, strangling, and dragging the young woman. They explained that, following defendant's departure, the woman was in convulsions and was having difficulty breathing. She was later treated at a hospital for minor cuts and a 20% pneumothorax (partial collapse of the lung), that, if left untreated, could have resulted in a total collapse of the lung.

State v. Cunningham, 1998 ME 167, ¶¶ 2-3, 715 A.2d 156, 156-57.

Cunningham's 28 U.S.C. § 2254 ineffective assistance claims are: one, his trial attorney should have argued that the alternative elements in 17-A M.R.S.A. § 208 render the statute unconstitutional (and the jury instructions, consequently, improper) in contravention of his due process rights[2]; two, his attorney should have objected to two

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[1] Cunningham explains in his reply to the State's response that he has served his prison sentence and is pursuing this 28 U.S.C. § 2254 petition because his current federal sentence was enhanced by this conviction. (Pet's Reply at 1.) Although the events giving rise to these charges occurred over seven years ago, there are no issues regarding the timeliness of this petition.

[2] In his reply memorandum Cunningham clarifies that he is not complaining about the instructions, per se, but that the statute permits the jury in rendering its verdict to "side step" its responsibility of determining what the defendant's state of mind indeed was at the time of the crime, the state of mind being an indispensable element of the crime. (Pet's Reply at 6, 8.) In his form petition Cunningham also frames

instances of hearsay testimony by the victim/witness, Julie Meggison, relaying what her doctor told her that her injuries resulted in scar tissue on her lungs and a tear to her rectum; and, three, counsel failed to object to the speculation testimony of a lay witness, Nancy Riessle, one of the two passengers in the car that stopped to investigate the roadside scene.

B. Framework of Federal Review

Section 2254 relief can be afforded Cunningham only if the state's adjudication of his claims:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.

28 U.S.C. § 2254(d). See also Lockyer v. Andrade, 538 U.S. __, __, 2003 WL 728766, *6 -12 (Mar. 5, 2003) (discussing the limitations on a federal court's § 2254(d)(1)inquiry vis-à-vis state court convictions).

The First Circuit has framed these review standards in the context of the Sixth Amendment inquiry for ineffective assistance of counsel, relying on the Supreme Court precedents of Strickland v. Washington, 466 U.S. 668 (1984) and Williams v. Taylor, 529 U.S. 362 (2000):

> To demonstrate ineffective assistance of counsel in violation of the Sixth Amendment, [the § 2254 petitioner] must establish (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) "a reasonable probability that, but for counsel's

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as a fourth ground that his counsel was ineffective because he should have objected to the jury verdict form's omission of separate bodily injury elements and mens rea. In his memorandum he does not touch upon this argument again. He does attach the verdict form.

A challenge to the jury verdict has no vitality independent of his challenge to the constitutionality of the statute/instructions that allow verdicts in the alternative. Thus, I treat the two grounds as one.

> unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984); see also Scarpa v. DuBois, 38 F.3d 1, 8 (1st Cir.1994). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.
>
> To prevail on his habeas petition, however, [the § 2254 petitioner] must demonstrate not just that the Strickland standard for ineffective assistance of counsel was met, but also that the [state court's] adjudication of his constitutional claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," Williams v. Taylor, 529 U.S. 362, 405 (2000), or if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a [different] result," id. at 406. A state court decision involves an "unreasonable application" of clearly established federal law if "the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.
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> The Supreme Court has made clear that "an unreasonable application of federal law is different from an incorrect application of federal law." Id. at 410. Therefore, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411, 120 S.Ct. 1495; see also Hurtado v. Tucker, 245 F.3d 7, 15-16 (1st Cir.2001).

Mello v. DiPaulo, 295 F.3d 137, 142-43 (1st Cir. 2002); see also Bell v. Cone, 535 U.S. 685, __, 122 S.Ct. 1843, 1850 (2002) (undertaking the § 2254(d)(1)/ Strickland analysis); Stephens v. Hall, 294 F.3d 210, 217-23 (1st Cir. 2002) (same).

In undertaking the unreasonable application analysis, "[t]he reasoning used by the state court is, of course, pertinent. The ultimate question on habeas, however, is not how well reasoned the state court decision is, but whether the outcome is reasonable." Hurtado v. Tucker, 245 F.3d 7, 20 (1st Cir. 2001) (citations omitted); see also Miller-El v. Cockrell, 537 U.S. __ , __, 2003 WL 431659, *2 (Feb. 25, 2003) (distinguishing the

objectively unreasonable standard of § 2254(d)(2) from the § 2254(e)(1) clear and convincing evidence standard applicable to factual determinations, clarifying that the "decisions" analyzed under (d)(2) need not be proved to be objectively unreasonable by clear and convincing evidence in order for relief to lie).

C. The Merits of the Three Grounds

1. Failure to Challenge the Constitutionality of Maine's Aggravated Assault Statute

In his § 2254 memorandum and reply memorandum, Cunningham claims that the alternative state-of-mind and different course of conduct elements of 17-A M.R.S.A. § 208 allow the jury to "side step" its responsibility of determining what the defendant's state of mind and course of conduct was vis-à-vis the crime. In response to the State's assertion that this claim was not presented to the state courts – and is unexhausted and procedurally defaulted -- Cunningham argues that while this challenge "perhaps not eloquently expressed, it was certainly presented to the state courts." (Id. at 8, citing Am. Post Conviction Pet. at 4.)

Cunningham did raise this challenge, but only in part, to the state post conviction court. In his amended post conviction petition Cunningham asserted that his trial counsel was ineffective in not objecting to the aggravated-assault-in-the-alternative jury instructions that allowed the jury to find him guilty if they concluded that he had inflicted either serious bodily injury or bodily injury under circumstances manifesting extreme indifference to the value of human life. (Am. Post Conviction Pet. at 3.) He also attributed fault to his attorney for allowing the jury form to list a single charge without reference to the alternative elements or options so that the jury did not need to be unanimous as to which alternative it found. (Id. at 4.)

In pre-hearing proceedings the state court concluded that Cunningham's "Failure to Object to Jury Instructions" claim had no vitality.

> Cunningham contends that his trial counsel should have objected because the instruction wrongly allowed a conviction based on a determination of some jurors that serious bodily harm was involved and a determination by the remaining jurors that extreme indifference to human life was involved.
>
> If the jury instruction given was correct, trial counsel cannot be faulted for not objecting. The court has reviewed the U.S. Supreme Court's decision in Schad v. Arizona, 501 U.S. 624 (1991), decided prior to trial in this case, and concludes the jury instruction was neither erroneous nor questionable. This is confirmed by cases decided by the Law Court both before and after the trial in this case. See State v. Pickering, 462 A.2d 1151, 1156 (Me. 1983); State v. St. Pierre, 1997 ME 107 ¶¶ 5-7, 693 A.2d 1137, 1139.
>
> Accordingly, petitioner's claim that trial counsel was ineffective for not objecting to the instructions and verdict form because those did not sufficiently require unanimity is dismissed.

(Dec. & Order at 3-4.)

Accordingly, I reject the State's argument that, as required by 28 U.S.C. § 2254(B), this ground was not exhausted with respect to Cunningham's claim that his attorney should have argued that it was constitutionally impermissible to allow conviction without unanimity on whether he inflicted serious bodily injury or whether he inflicted bodily injury under circumstances manifesting extreme indifference to the value of human life. In reaching this conclusion I am guided by the lengthy discussion of what constitutes adequate presentation of a constitutional issue to state courts in Barresi v. Maloney, 296 F.3d 48, 51-56 (1st Cir. 2002). Indeed, as evidenced by the post conviction court's recognition of the claim, "a reasonable jurist would recognize the

constitutional dimensions of the petitioner's claims, given the manner in which those claims were presented." Id. at 52.[3]

The post-conviction's adjudication of this claim did not apply "a rule that contradicts the governing law set forth in [the Supreme Court's] cases," Williams v. Taylor, 529 U.S. at 405, nor did the post-conviction court confront a set of facts "materially indistinguishable" from a decision of the Supreme Court arriving, nevertheless, at a different result. Id. at 406. Throughout its decision the court applied an ineffective assistance of counsel standard, focusing on performance and prejudice, fully consistent with Strickland. See Kimball v. State, 490 A.2d 653, 656 (Me.1985); accord Brewer v. Hagemann, 2001 ME. 27, ¶9, 771 A.2d 1030, 1033; see also Mello, 295 F.3d at 144 (observing that the Strickland and Massachusetts standards are the "functional equivalent" for purposes of proceeding with the § 2254(d)(1) determination). With respect to the underpinnings of this ineffective assistance claim, if there is a Supreme Court case that comes close to being "materially indistinguishable" from this case, it would be the case identified by the post conviction court, Schad v. Arizona, 501 U.S. 624 (1991), and the post-conviction court arrived, with the Strickland overlay, at the same result as the Schad majority.

Moving to the unreasonable application prong of § 2254(d)(1), in Schad the Court addressed a challenge to an Arizona first-degree murder statute that permitted conviction

[3] Because it is true that Cunningham's challenge to 17-A M.R.S.A. § 208's alternative states of mind, in addition to the alternative course of conduct, was not articulated to the state court I will not address it. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). I note there has been no adjudication by the state courts that this claim is "procedurally defaulted," but it clearly appears to be in a posture for such treatment. It simply would do Cunningham no service for this court to rule on the unexhausted portion of the claim, because it would only be swiftly rejected for the same reasons the exhausted portion of this ground has no § 2254 merit. It might be said that Schad is even more aligned with this unexhausted claim. Schad extended prior precedents involving challenges to alternative "actus reus" to cases challenging alternative "mens rea." 501 U.S. at 632.

under instructions that did not require the jury to agree on alternative theories of premeditated or felony murder. Id. at 630. It framed the question as, "whether it was constitutionally acceptable to permit the jurors to reach one verdict based on any combination of the alternative findings." Id. The Court undertook a lengthy review of due process principles implicated by such statutes, historic and widely shared practice, and various conceptualizations by state and lower federal courts (and the dissent) of the concerns generated by "alternative findings." See id. at 632-43. The Court concluded that it is "impossible to lay down any single analytical model for determining when two means are so disparate as to exemplify two inherently separate offenses." Id. at 643. Noting that while the jury instructions and verdict forms requiring more specificity might be desirable, the majority concluded that the jury's option between felony murder and premeditated murder (in a capital case) "did not fall beyond the constitutional bounds of fundamental fairness and rationality." Id. at 645.

It simply was not an objectively unreasonable application of Schad and Strickland to conclude that counsel was not deficient by failing to mount a challenge to 17-A M.R.S.A. § 208. A challenge by Cunningham's attorney would have been frivolous in view of Schad. Surely, in terms of the need for separate offenses, there is less disparity between serious bodily injury and bodily injury stemming from depraved indifference than the disparity between felony murder and premeditated murder at issue in Schad. Nothing in the Court's discussions in Schad would warrant reaching a different conclusion vis-à-vis 17-A M.R.S.A. § 208.

2. Hearsay Testimony of the Assault Victim, Julie Meggison

In his amended state post conviction petition Cunningham argued that his trial attorney was ineffective in failing to object to Meggison's hearsay statements "that she was told by her doctor that her injuries resulted in scar tissue on her lungs and a tear to her rectum, despite a pretrial ruling excluding this testimony." (Am. Post Conviction Pet. at 2, record citations omitted.)

The State represents to this court that, just prior to the post conviction hearing, Cunningham's post-conviction attorney indicated that he would not be pursuing the facet of his ineffective assistance of trial counsel claim premised on the failure to object to Meggison's hearsay testimony concerning rectal tears. (Resp. § 2254 Pet. at 22-23.) At the start of the state post conviction hearing the court articulated the Meggison ground as only involving the hearsay testimony concerning her lung injuries. (Post Conviction Tr. at 4.) And, well into the hearing Cunningham's post-conviction attorney clarified that he was only pursuing this ground vis-à-vis two instances of lung injury testimony. (Id. at 128-29.)

With respect to the victim's lung related hearsay the state post-conviction court disagreed with Cunningham's position. First it addressed Cunningham's attack concerning Meggison's testimony that after her release from the hospital she continued to have chest pains for two to three months. Specifically, Cunningham objected to her testimony, that her ability to breath was impacted: "Well it – my lungs were weakened so I did end up with my lung collapsed and a tube in my lung because my lungs have been damaged so they are weak." (Tr. Vol. I. at 95-96.) The post conviction court viewed this testimony in the context of the other evidence admitted at trial. In particular it noted that

a physician testified that Meggison had suffered a chest injury and that her lung had collapsed twenty-percent (a condition known as pneumothorax). (Dec. & Order at 9-10.) The doctor indicated that this condition could have worsened even to the point of an entire collapse and that a worsening could result in the need to surgically insert a tube. (Id. at 10.) This witness indicated that Meggison had a broken rib or ribs, had multiple scrapes and bruises, and that, when she came to the emergency room after the assault, she was holding the right side of her chest and saying it hurt to breathe. (Id.)[4]

Citing the factual summary of the Law Court, excerpted above, the Court concluded:

> Within the factual context, and within the context of the medical testimony described above, it is the opinion of this Court that there was nothing objectionable in Ms. Meggison's testimony that her lungs were weakened, that she ended up with her lung collapsed and a tube in her lung because her lungs had been damaged so they are weak. Even if there was something technically objectionable, and thus his failure to object to this testimony, it did not amount to serious incompetency, inefficiency or inattention, nor was it performance that fell below that of an ordinarily fallible attorney. Furthermore, in view of the context of the evidence summarized by the Law Court and the other evidence admitted at trial, Petitioner has failed to prove that [his trial attorney's] failure to object likely affected the outcome of the trial.

(Id. at 11.)

The Court then tackled Cunningham's complaint about another passage of Meggison's testimony: when asked whether she eventually ended up with a tube in her lungs attributable to her injuries inflicted by Cunningham, she answered, "they said there was some scar tissue on my lung from some kind of pressure or

[4] In his § 2255 pleadings, particularly his reply, Cunningham attempts to attack the post conviction court's reliance on evidentiary findings as they relate to the extent of injury to Meggison. This petition is not an opportunity to rehash the facts underlying his conviction.

something and that is the only pressure that ever happened to me." (Tr. Vol. I at 96-97.)

The post conviction court stated:

> This Court is satisfied that the last question (i.e. "was that to your knowledge attributed to the incident or the damage to your lung at that time?") and the answer thereto were objectionable on hearsay grounds. Indeed, [Cunningham's trial attorney] testified at the Post-Conviction hearing that, had he heard this question or the answer, he would have objected. However, this Court finds that [Cunningham's trial attorney] heard neither this question nor the answer thereto because Petitioner was trying to get [his] attention at that time. Petitioner did so despite [trial counsel] having previously taken the precaution of instructing Petitioner not to try to talk to him while witnesses were testifying but, instead, to write down notes that [counsel] could review during pauses in the proceedings.
>
> Under these circumstances, it cannot be said that by failing to hear, and thus failing to object to, this single question and answer, [Cunningham's trial attorney's] performance fell below that of an ordinary[,] fallible attorney. Furthermore, in view of the other evidence regarding the violence and nature of the assault, the condition of the victim immediately after the assault, the medical evidence and the victim's admissible testimony about the injury she suffered and the continuing effects of that injury on her, this Court finds that the admission of this objectionable testimony was not likely to have effected the outcome of the trial and thus did not deprive the Petitioner of an otherwise available substantial ground of defense.

(Dec. & Order at 12.)

With respect to both branches of this Meggison hearsay ground the state post conviction court's application of Strickland is eminently reasonable.[5] Given the fact that the victim was the person who was rendering the description of her injuries it may well be a considered trial tactic not to object to her hearsay testimony especially in the context of a direct description of her woes. The post conviction hearing court's finding of fact -- that as to the second hearsay incident it was Cunningham's own distraction of counsel

[5] Unlike the first ground just addressed, this ground and Cunningham's third, do not require a bipartite analysis of "clearly established federal law," i.e., Strickland/ +, e.g., Strickland/Schad.

that prevented his attorney from catching and considering the hearsay concern -- is entitled to the deference of 28 U.S.C. § 2254(e)(1). Finally, I note that Meggison's was not the kind of hearsay testimony that raises the specter of prejudice vis-à-vis the confrontation clause. See e.g. Levasseur v. Pepe, 70 F.3d 187, 199 (1st Cir. 1995) (concluding that failure to object to significant hearsay testimony was a deficient performance by counsel but was not prejudicial).

3. Speculation Testimony of Nancy Riessle

Cunningham argues that Riessle's testimony that Meggison would have died had she (and her co-passenger) not come along was improper speculation and the problem was compounded when the prosecutor imported the statement into the State's closing argument.[6]

Cunningham's trial attorney had successfully pressed a pre-trial motion in limine for an order that Riessle would not be allowed to testify to her impression that Cunningham was killing or about to kill Julie Meggison. At the beginning of trial the judge ruled on the motion and ordered, among other things, Riessle and her co-passenger would not be permitted to "state something to the effect of something could have happened." (Tr. Vol. I at 7.) However, the judge did expressly indicate that certain testimony in this area would be allowed. "For instance," the judge explained, "if they said they saw her, and what did it appear to you was happening, it appeared that he was in the process of killing her, or something to that effect, [it] will be permitted." (Id.)

[6] Cunningham also, as part of this ground, states that the prosecutor argued about broken ribs, evidence about broken ribs having never been introduced. He asserts that the objectionable hearsay, speculation, and broken rib argument combined to undermine a conclusion that the prosecutor had proven his guilt beyond a reasonable doubt. The broken rib concern and this notion of cumulative error by counsel was not presented to the state court and is unexhausted.

At the trial Riessle testified that Cunningham was beating Meggison and dragging and kicking her, including kicking her in the chest. On direct examination Riessle was asked: "Did you have any opinion as to what was going on or what might have happened if you hadn't come along?" (Tr. Vol. II at 57.) Riessle responded: "From what I saw, it didn't appear that this man was going to let her go, I – if we hadn't come along when we did, I honestly feel he would have killed her." (Id.)

In his amended post conviction petition Cunningham faulted his trial attorney for not objecting to Riessle's speculation of what Meggison's fate would have been if Riessle had not come along. (Am. Post Conviction Pet. at 3.) He notes that this statement was included in the prosecutor's closing statement. (Id.) The State court allowed this claim to proceed to hearing.

In turn the post conviction court ruled:

> This Court finds that the testimony elicited by the prosecution was within the parameters set by the trial justice and, even if an objection might have resulted in a change in the form of the question or the form of Ms. Riessle's testimony, the substance of that testimony (i.e., it looked like Petitioner was killing or about to kill Julie Meggison when Riessle[] ... happened to come along) would have been allowed into evidence. Therefore, Petitioner has failed to prove that [his trial attorney's] failure to object to this testimony constituted conduct that fell below that of an ordinary[,] fallible attorney, and Petitioner has also failed to prove that, as a result of [his trial counsel's] failure to object to this testimony, he (i.e., Petitioner) was deprived of an otherwise available substantial ground of defense.

(Dec. & Order at 6.)

As a 28 U.S.C.§ 2254 ground, this challenge to Cunningham's conviction deserves little discussion. Counsel had moved prior to trial to exclude Riessle's speculation of the ultimate fate of Meggison had Riessle and her companion not arrived on the scene. The post conviction court's conclusion that Riessle's testimony was in the

spirit of the in limine ruling and was not speculation on what would have happened had she not come along is sound. Equally unassailable is the court's conclusion that at most an objection would have resulted in a rephrasing that would not have impacted the jury verdict. Bottom line, there was no unreasonable application of Strickland with regards to this third ground.

Conclusion

For these reasons I recommend that the Court **DENY** this 28 U.S.C. petition.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

April 1, 2003

ADMIN

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 1:02-cv-00158-GZS
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CUNNINGHAM v. CORRECTIONS, ME WARD
Assigned to: Judge GEORGE Z. SINGAL
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 10/04/02
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

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